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J. L. V.

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RECENT CASES

ACTIONS — COSTS — TENDER AFTER ACTION BEGUN — TORTS. Plaintiffs brought suit for damages upon three causes of action all sounding in tort. Defendant denied the first and third and, at the time it filed its answer, tendered the sum of $1.00 for the reasonable rental value on the second cause of action, and $24.80 costs and paid the same into the registry of the court. Plaintiffs refused the tender and the case was tried before a jury. Judgment was rendered for plaintiffs on the second cause of action. Defendant's costs subsequent to the tender were taxed against the plaintiffs; from this plaintiffs appeal. *Held:* REM. REV. STAT. § 486, providing for tender after suit begun is applicable to tort actions, and costs were correctly taxed against plaintiffs. *Patrick v. Ilwaco Oyster Co.*, 89 Wash. Dec. 130 (1937).

REM. REV. STAT. § 486 provides that if the defendant in any action pending shall at any time deposit with the clerk for the plaintiff the amount which he admits is due together with costs that have accrued and notifies the plaintiff, and such plaintiff shall refuse to accept the same in discharge of the action and shall not thereafter recover a larger amount than that deposited with the clerk, exclusive of interest and costs, he shall pay all costs that may accrue from the time such money was so deposited.

At common law a tender could not be made after suit begun, nor could it be made in any case where damages were unliquidated, which, of course, included tort actions. *Johnson v. Williams*, 222 Ala. 278, 132 So. 170 (1930); *Cilley v. Hawkins*, 48 Ill. 308 (1868); *Greene v. Shertliff*, 19 Vt. 592 (1847). The appellant contended that REM. REV. STAT. § 485, providing for such tenders before suit begun, merely codifies the common law rule, and that REM. REV. STAT. § 486, providing for tenders after suit begun, merely enlarged the common law rule to allow such tender *after* suit begun; that the latter was not intended to apply to tort actions.

This is the first time that the statute has been before the court on this point. The result reached is well supported in other jurisdictions in their construction of similar code provisions. *Basler v. Sacramento Gas & Electric Co.*, 158 Cal. 514, 111 Pac. 530 (1910); *Kaw Valley Fair Ass'n v. Miller*, 42 Kan. 20, 21 Pac. 794 (1889); *Hammond v. Northern Pac. R.*, 23 Ore. 157, 31 Pac. 299 (1892).

J. L. V.

CONSTITUTIONAL LAW — INTERSTATE COMMERCE — TAX ON STEVEDORING. Plaintiff stevedoring company seeks to enjoin the collection of the Washington business and occupation tax on the ground that it participates in the movement of interstate and foreign commerce and that the assessment of a gross receipts tax on the privilege of engaging in business is an unconstitutional burden on interstate commerce. Plaintiff, a local corporation, supplies stevedores to shipowners. The men work under the direction and control of the ships' officers, plaintiff advancing the pay to the laborers and thereafter collecting from the shipowner or master the amount of the pay rolls, plus commission for services. *Held:* The tax is not unconstitutional because the plaintiff is not engaged in interstate commerce and the tax only affects such commerce remotely and incidentally. *Puget Sound Stevedoring Co. v. Tax Commission of Wash.*, 89 Wash. Dec. 111, 63 P. (2d) 532 (1937).

Just when the rendering of services incidental to interstate commerce is itself engaging in interstate commerce so as to make a company im-

mune from state taxation for the privilege of engaging in such business has not been decisively determined. A franchise tax imposed upon a railway company for carrying on a cab service wholly within the state for the purpose of conveying its passengers to and from its ferry landing, the charges for which are entirely separate from those for other transportation, is not a burden on interstate commerce. *New York ex rel. Penn. R. Co. v. Knight*, 192 U. S. 21, 48 L. ed. 325, 24 Sup. Ct. 202 (1904). However, a state cannot impose a capital stock tax on a foreign corporation engaged in ferrying passengers and freight across an interstate river, because the business of landing and receiving passengers and freight at the wharf on one side of the river is a necessary incident to and a part of their transportation across the river and a tax on such business is a tax upon the commerce between the two states. *Gloucester Ferry Co. v. Penn.*, 114 U. S. 196, 29 L. ed. 158, 5 Sup. Ct. 826 (1885). Of course operations wholly performed in a single state may still be a part of interstate commerce, and the United States Supreme Court has frequently stated that interstate commerce continues while there is continuity of movement. *The Daniel Ball*, 77 U. S. 556, 19 L. ed. 999 (1871). The fact that several different and independent agencies are employed in transporting the commodity does in no respect affect the character of the transaction. *The Daniel Ball, supra.* A belt line railroad owned by the State of California and operating wholly within the confines of that state was recently held to be engaged in interstate commerce, though the state maintained no freight station, issued no bills of lading, and was engaged only in moving cars at a flat rate. *U. S. v. California*, 297 U. S. 175, 80 L. ed. 367, 56 Sup. Ct. 421 (1936). A boat licensed to carry on the coasting trade and engaged in lightering goods from and to vessels engaged in foreign trade is not subject to a state license. *Foster v. Davenport*, 63 U. S. 248, 16 L. ed. 248 (1859). A license or privilege tax on the cars of the Pullman Company which are hauled by railroads is an unconstitutional burden on interstate commerce. *Pickard v. Pullman Southern Co.*, 117 U. S. 34, 29 L. ed. 785, 6 Sup. Ct. 635 (1886). Likewise, a city cannot require an express company carrying goods from the depot to the consignee to take out a license as a condition precedent to conducting its business. *Barrett v. N. Y.*, 232 U. S. 14, 58 L. ed. 483, 34 Sup. Ct. 203 (1913). But a toll bridge company operating a bridge across to another state and collecting compensation from railroads using the bridge is not engaged in interstate commerce if it conveys no persons or goods across itself. *Henderson Bridge Co. v. Kentucky*, 166 U. S. 150, 41 L. ed. 953, 17 Sup. Ct. 532 (1896). The Supreme Court has recently said that, "interstate transaction in its fundamental aspect ends upon delivery to the consignee". *Whitfield v. Ohio*, 297 U. S. 431, 80 L. ed. 527, 56 Sup. Ct. 532 (1936). Perhaps, then, that court would differ from the Washington court and hold that stevedoring is such an essential link in interstate commerce that a state gross receipts tax on the privilege of doing business would be an unconstitutional burden on commerce.

Does the fact that the stevedoring company merely supplies the laborers to the carrier and does not do the work itself make any distinguishable difference? If the United States Supreme Court could find such a difference, then it might affirm the holding of the Washington court.

W. G.

CORPORATIONS—FOR CHARITABLE PURPOSES—MAKING OF PROFIT. The preamble to the articles of incorporation stated a desire to form a corporation "in conformity with the laws of the state of Washington relative to corporations and associations formed for religious, social, and charitable purposes." The corporation was organized by a group of employers to provide medical aid to employees, from contributitons made by both employers and employees, the contributions in fact being less than those required by the Medical Aid Act for the same service from the state. In *quo warranto* proceedings against the corporation, the state contends that the corporation is a profit-making organization and not a charitable corporation within the purview of REM. REV. STAT. § 3863. *Held:* The corporation is not performing any religious, social, or charitable functions and in fact is a profit-making association on the theory that a penny saved is a penny earned; the members received medical aid protection as required by statute for less than the statutory fee. *State ex rel. Troy v. Lumberman's Clinic*, 86 Wash. Dec. 336, 58 P. (2d) 812 (1936).

In the principal case the court divides the purposes for incorporation into two classes, religious, social, and charitable, and those organized to gain some direct or indirect material advantage. Obviously the former can take advantage of the benefits of the special incorporation statute, REM. REV. STAT. § 3863, while the latter are to be termed business corporations and come under the general corporate laws.

The decisional differentiation seems to be whether the particular corporation has as its primary object the making of a profit for its members. It is submitted that the making of a profit as the primary purpose of a corporation is fatal to the claim of charitable institution because the two terms "profit" and "charity" are repugnant. But the fact that a corporation is "not for profit" will not stamp it as a religious, social, or charitable corporation. *Society of St. Stephens, The Martyr, v. Mrs. Stephen Sikorski*, 141 Ill. App. 1 (1901); *State ex rel. Richey v. McGrath*, 95 Mo. 193, 8 S. W. 425 (1888); *State v. Browner*, 15 Mo. App. 597 (1884); FLETCHER, CYCLOPEDIA OF CORPORATIONS, § 79.

The fact that a corporation makes a profit is not controlling. If the profit is merely subordinate and incidental to the principal purpose of its existence, then it can be said to be a non-profit corporation. *Southerland v. Decimo Club*, 16 Del. Ch. 183, 142 Atl. 786 (1928). The nature of the profit is a matter of some concern. Generally speaking, the test is whether dividends are to be paid or not. Subterfuges whereby the profits are diverted to the members by other means than dividends will not remove the profit making features of the corporation. *Read v. Tidewater Coal Exchange, Inc.*, 13 Del. Ch. 195, 116 Atl. 898 (1922); *Southerland v. Decimo Club, supra.* The corporation in the instant case was not making a profit in the sense of eventually paying dividends. However, by performing the same service for less than the statutory fee, as provided under the Medical Aid Act, it was gaining an indirect advantage for its members which the court branded as a subterfuge; thus it was making a profit. It is suggested that the court reached a desirable result, for it seems clear that it was not the legislative intent to allow the easy and liberal provisions of the religious, social, and charitable incorporation act to be enjoyed by corporations whose predominate purpose is the making of profit in some manner or other.

H. S. M.

INSURANCE—ASSIGNMENT OF POLICY—VESTED INTEREST OF BENEFICIARY. The insured in his application for life insurance reserved to himself the right with the consent of the company to change the beneficiary only to a relative by blood or marriage, or to a dependent, but not to himself or to his estate or personal representatives. The children, or the wife of the insured if they predeceased her, were named beneficiaries. The insured assigned this policy to the appellant as security for loans. *Held*: The assignee takes the proceeds to the exclusion of the beneficiaries since the latter did not have a vested interest in the policy. *Massachusetts Mutual Life Insurance Co. v. Bank of California et al.*, 87 Wash. Dec. 469, 60 P. (2d) 675 (1936).

When the right to change the beneficiary is not reserved in the policy the beneficiary named therein acquires a vested interest in the policy which cannot be divested by any act of the insured, and under such circumstances the insured cannot assign the policy without the consent of the beneficiary. *Koch v. Aetna Life Insurance Co.*, 165 Wash. 329, 5 P. (2d) 313 (1931); VANCE, INSURANCE, (2d ed.) 543. Wisconsin is the only American jurisdiction *contra*; *Boehmer v. Kalk*, 155 Wis. 156, 144 N. W. 182, 49 L. R. A. (N. S.) 487 (1913). However, when it is provided in the policy that the insured may change the beneficiary, the universally recognized rule is that the beneficiary's interest may be divested by the substitution of a new beneficiary. *Seattle Ass'n of Credit Men v. Bank of California*, 177 Wash. 130, 30 P. (2d) 972 (1934); note (1926) 60 A. L. R. 184. In this type of policy the courts say that the interest of a designated beneficiary, prior to the death of the insured, is that of a mere expectancy of an incompleted gift, subject to revocation at the will of the insured. The rule that in the absence of an express reservation of the right to change beneficiaries one cannot subsequently agree with an insurance company as to a different disposition of the money to become due under the policy without the consent of the named beneficiary is unique in contract law and has been severely criticised for ignoring general principles. Vance, *The Beneficiary's Interest in a Life Insurance Policy*, (1922) 31 YALE L. J. 343.

Because it is an anomaly the American courts have been reluctant to extend the rule further and decline wherever possible to declare the interest of a beneficiary vested and tend generally to restrict the rights of the beneficiary while protecting those of an assignee. Where the insured has reserved the right to change the beneficiary in a majority of states he may assign the policy at will, such assignment giving the assignee a claim prior to that of the beneficiary. VANCE, INSURANCE, 536. Also, non-compliance with the rules laid down in the policy for the procedure in making an assignment does not invalidate it. *Schade v. Western Union Ins. Co.*, 125 Wash. 200, 215 Pac. 521 (1923). If the insured has the right to change the beneficiary any act clearly indicating the intention of the insured to change his beneficiary will effectuate the change when no mode for making a change is set out in the policy. *Koch v. Aetna Life Ins. Co., supra.* Even if the policy is delivered over to the named beneficiary he will not have a vested interest so as to defeat a subsequent assignment if the insured reserved the right to name a new beneficiary. *Toole v. Natl. Life Ins. Co.*, 169 Wash. 627, 14 P. (2d) 468 (1932). Although the policy states that any assignment must be in writing, an oral assignment is valid as against an expectant

beneficiary. *Seattle Ass'n of Credit Men v. Bank of California, supra.* Such provisions are for the protection of the insurer and he alone can complain. Many courts also have held that one may dispose of an insurance policy by devise if no beneficiary has a vested interest in it. *Benson v. Benson*, 125 Okl. 151, 256 Pac. 912, 62 A. L. R. 935.

No other Washington case involving an assignment where the right to change the beneficiary was restricted to a limited class has been discovered. Nevertheless the result reached is manifestly in accord with the usual rule, the court logically reasoning that since the insured by the terms of the policy could change the beneficiary within the class described in the application, even though it was a limited class, the named beneficiaries quite obviously had no vested rights or interest, but had only a mere expectancy which could be wiped out if the insured chose to exercise the privilege he reserved to himself of naming other relatives as his beneficiaries.

W. G.

LIMITATION OF ACTIONS—PERSONAL SERVICE CONTRACTS. In an action for personal services rendered continuously during the last years of testatrix' life, for which testatrix orally promised to pay, the promise being indefinite as to the time of payment. *Held:* The statute of limitations commenced to run only upon the death of the testatrix. *Wax v. Adair*, 60 P. (2d) 904 (Cal., 1936).

This rule is the one adopted by the Washington Court in *Morrissey v. Faucett*, 28 Wash. 52, 68 Pac. 352 (1902). The majority rule is in accord: *Mayborne v. Citizens' Trust & Savings Bank*, 188 Cal. App. 178, 188 Pac. 1034 (1920); *Story v. Story*, 1 Ind. App. 284, 27 N. E. 573 (1891); *Sullenbarger v. Ahrens et al.*, 168 Iowa 288, 150 N. W. 71 (1914); *Grisham v. Lee*, 61 Kan. 533, 60 Pac. 312 (1900); *Carter v. Carter*, 36 Mich. 207 (1877); *Phifer v. Phifer's Estate*, 112 Neb. 327, 199 N. W. 511 (1924); *In re Bethel's Estate*, 111 Ore. 178, 226 Pac. 427 (1924); *Schoch's Adm'r v. Garrett*, 69 Pa. 144 (1871); *Gulbranson v. Thompson*, 63 Utah 115, 222 Pac. 590 (1923); *Clark v. Gruber*, 74 W. Va. 533, 82 S. E. 338 (1914). The same result is reached in Washington where the period of employment is indefinite but at an agreed monthly rate of compensation. *Ah How v. Furth*, 13 Wash. 550, 42 Pac. 639 (1896).

In a few jurisdictions the courts imply a promise to pay as the services are rendered, so recovery is limited to the statutory period before the action brought. *Dempsey v. McNabb*, 73 Md. 433, 21 Atl. 378 (1891); *Brunnert v. Boeckmann's Estate*, 258 S. W. 768 (Mo., 1924); *Miller v. Lash*, 85 N. C. 51, 39 Am. R. 678 (1881). This result is placed on the ground that the contract being terminable at the will of either party, the employee is entitled to pay as he works.

At least two jurisdictions hold that a hiring from year to year will result from a service contract indefinite as to time, and only wages for those years within the statute of limitations are recoverable. *Miller v. Cinnamon*, 168 Ill. 447, 48 N. E. 45 (1897); *Davis v. Graton*, 16 N. Y. 255, 69 Am. R. 694 (1857).

Under a continuous contract for personal services, work performed years previous to the suit will not usually be more difficult to prove than that done within the statutory period since it is all of the same type. Typically in these cases employee and employer are bound by

family ties and demands for payment will not normally be made until the service is terminated. The majority rule recognizes these facts and is to be preferred.

K. S. T.

NEGLIGENCE—EVIDENCE—OTHER ACCIDENTS. Plaintiff sued Pierce County for damages growing out of an accident in which the plaintiff's truck left the road as it was moving around a curve, the alleged negligence of the defendant consisting in the manner of construction of the road and in failing to maintain guard rails. Plaintiff attempted to introduce evidence of other accidents at the same place, but was not allowed to do so. *Held*: Such evidence is not admissible to prove negligence, but is admissible to show notice and also as descriptive of the condition of the road; however, properly excluded because immaterial in the instant case. *Tyler v. Pierce County*, 88 Wash. Dec. 174, 62 P. (2d) 32 (1936).

The Washington court has had occasion to deal with this problem in many instances. In *Elster v. Seattle*, 18 Wash. 304, 51 Pac. 394 (1897), a case involving the disrepair of a board walk, it was held that evidence of prior accidents was admissible as descriptive of the condition of the walk and as tending to prove notice to the city. The leading case in this jurisdiction, *Smith v. Seattle*, 33 Wash. 481, 74 Pac. 674 (1903), approved of the position in the *Elster* case, quoting *Dist. of Col. v. Armes*, 107 U. S. 519, 2 Sup. Ct. 840, 27 L. Ed. 618 (1883), to the effect that such evidence tended to show the dangerous character of the place. *Blair v. Seattle Elec. Co.*, 67 Wash. 465, 122 Pac. 358 (1912), allowed this type of evidence to prove the dangerous condition of the street, in that horses were liable to get their shoes caught in the frogs of the street car tracks.

In the instant case the court said that it was not willing to go beyond the limits of the *Smith* case *supra*, and further said that the *Smith* case did not stand for the proposition that other accidents were admissible to prove negligence, even though that case quoted language to the effect that it was admissible for that purpose. It is submitted, however, that the quoted language used in the *Smith* case never did stand for the proposition that such evidence was admissible to prove negligence, but merely was to the effect that frequency of accidents tend to show the dangerous character of the place.

At any rate, the present status of the law in this jurisdiction is that while evidence of prior accidents tends to show the condition of the street and is also admissible as notice, it is not admissible to prove negligence.

C. P.

PUBLIC UTILITIES—DISTRIBUTION OF POWER BY PRIVATE CONTRACT. A coal mining company contracted for the sale of its surplus power to a small municipality which in turn distributed the power to its inhabitants. The contract expressly reserved to the mining company the privilege of ceasing performance should it be declared a public utility, and stipulated that no service was being offered to the public. *Held*: The mining company is not a public utility subject to regulation by the state. *Colorado Utilities Corp. v. Public Utilities Commission*, 61 P. (2d) 849 (Colo., 1936).

Statutes like Colorado's Public Utilities Act and Washington's (REM. REV. STAT. §§ 10339 *et seq.*) have been interpreted to intend regulation only of electrical enterprises affecting the public as a whole. *State ex rel. Public Serv. Comm. v. Spokane and I. E. R. R.*, 89 Wash. 599, 154 Pac. 1110, P. U. R. 1916D 469, L. R. A. 1918C 675 (1916); *Story v. Richardson*, 186 Cal. 162, 198 Pac. 1057, 18 A. L. R. 750 (1921); *Del Mar Water, L. & P. Co. v. Eshleman*, 167 Cal. 666, 140 Pac. 591 (1914). The frequently quoted opinion in the *Spokane case* stated that the right to regulate under Washington's present law must be measured by the public interest, and that unless all are entitled to receive service upon equal terms, the company, like any merchant, may sell its commodity at one price to one man and at another price to another. But the courts have been astute to find that a given enterprise is in fact a public service, and as such subject to state regulation. The test uniformly applied is that of availability of the product to the indefinite public. Intent to conduct a private business is immaterial, if there has in fact been a holding out, either express or implied, that service will be rendered to all, subject only to the limitation of capacity. *Producers' Transportation Co. v. R. R. Comm.*, 251 U. S. 228, 40 Sup. Ct. 131, 64 L. Ed. 239 (1919); *Terminal Taxicab Co. v. Kutz*, 241 U. S. 252, 36 Sup. Ct. 583, 60 L. Ed. 984 (1916); *State v. Wash. Tug & Barge Co.*, 140 Wash. 613, 250 Pac. 49 (1926); *Cushing v. White*, 101 Wash. 172, 172 Pac. 229, L. R. A. 1918F 463 (1918); *Breuer v. P. U. Comm.*, 118 Ohio St. 95, 160 N. E. 623 (1928); *Thayer v. Calif. Development Co.*, 164 Cal. 117, 128 Pac. 21 (1912); *State ex rel. Public Serv. Comm. v. Spokane & I. E. R. R., supra; State ex rel. Addy v. Dept. of Public Works*, 158 Wash. 462, 291 Pac. 346 (1930).

The test should apply with equal force to wholesale and retail distribution of power. See *Notes* (1924) 34 Yale L. J. 209.

Apparent disagreement in the cases can be laid to the difficulty in determining what facts are sufficient to justify an inference that there is an extension of service to the public. In *Clark v. Olson*, 177 Wash. 237, 31 P. (2d) 534 (1934), a divided court held that a vendor of land, who supplied his ten vendees and nine other houses in the vicinity with water, refusing no requests except that of the complainant, was not a public utility. The case turned upon lack of solicitation, and the fact that service was rendered at cost. *State ex rel. Addy v. Dept. of Public Works, supra*, reached the opposite conclusion where the vendors organized a corporation for the purpose of supplying water to their vendees and "people in the vicinity". In both cases the court applied the above mentioned test of a public utility, doctrinally in accord with the principal case. But it is impossible to state dogmatically that the Washington court, had the facts of the Colorado case been presented to it, would have declared that the mining company was not a public utility. Although such factors as solicitation, advertisement, sale at a profit rather than as an accommodation, and the extension of service at all requests, are strong evidence of the existence of a public service, the majority of decisions have been within the class of borderline cases giving the courts ample opportunity to seize upon detailed facts to swing a holding in either direction.

M. D. G.

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